

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|------------------------|---|--------------------------------|
| LANNETTE HEIDENHAIN, |) | |
| |) | No. CV-04-237-CI |
| Plaintiff, |) | |
| |) | ORDER GRANTING IN PART |
| v. |) | PLAINTIFF'S MOTION FOR SUMMARY |
| |) | JUDGMENT AND REMANDING FOR |
| JO ANNE B. BARNHART, |) | ADDITIONAL PROCEEDINGS |
| Commissioner of Social |) | PURSUANT TO SENTENCE FOUR OF |
| Security, |) | 42 U.S.C. § 405(G) |
| |) | |
| Defendant. |) | |
| |) | |

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 19) submitted for disposition without oral argument on July 1, 2005. Attorney Donald C. Bell represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 15.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and **REMANDS** for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Plaintiff, who was 39-years-old at the time of the administrative decision, protectively filed an application for

1 Supplemental Security Income (SSI) benefits on December 19, 2001,
2 alleging onset as of June 1, 2000, due to panic disorder. (Tr. at
3 67.) Plaintiff attended school through the eighth grade, has not
4 earned a GED, can read and write, but has problems performing more
5 than simple subtraction and addition. (Tr. at 365-66.) Past work
6 included day care provider for family members, housekeeper and fruit
7 packer. Plaintiff has never traveled outside the Wenatchee area.
8 Following a denial of benefits and reconsideration, a hearing was
9 held before Administrative Law Judge R. J. Payne (ALJ). The ALJ
10 denied benefits after concluding Plaintiff was able to perform a
11 range of medium, light and sedentary work. Review was denied by the
12 Appeals Council. This appeal followed. Jurisdiction is appropriate
13 pursuant to 42 U.S.C. § 405(g).

14 **ADMINISTRATIVE DECISION**

15 The ALJ concluded Plaintiff had not engaged in substantial
16 gainful activity due to severe impairments including panic attacks,
17 but that impairment did not meet the Listings. The ALJ concluded
18 Plaintiff's testimony was not fully credible and that she retained
19 the residual capacity to perform a wide range of medium work with
20 limited interaction with the public. (Tr. at 24.) The ALJ found
21 Plaintiff was able to perform her past work as a child care provider
22 or housekeeper; alternatively, she could perform other work which
23 exists in significant numbers in the national economy, including
24 launderer / dry cleaning machine operator, janitor, hand painter /
25 coater, produce inspector, laborer, miscellaneous wood working
26 machine operator or material making equipment operator. Thus, the
27 ALJ concluded Plaintiff was not disabled.

ISSUES

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff asserts the ALJ erred when he (1) improperly relied on the testimony of a consulting physician, (2) improperly rejected the findings and opinion of an examining physician, (3) did not properly credit Plaintiff's testimony; (4) failed to fully develop the record; (5) failed to consider the testimony of the lay witness; and (6) failed to conduct a proper step four analysis. Finding the first four issues to be dispositive, the court does not address issues five and six.

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy" 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

ANALYSIS

Plaintiff first contends the ALJ improperly relied on the testimony of the consulting physician, Dr. Norman Gustavson, who concluded there were no limitations except for interaction with the public. (Tr. at 312.) Plaintiff contends Dr. Gustavson's opinion is not consistent with other evidence in the record; specifically, the opinions of examining physicians Drs. Rowe and Startzel.

1 Plaintiff also asserts these opinions were not rejected with
2 specific, legitimate reasons as required by *Lester v. Chater*, 81
3 F.3d 821, 830-31 (9th Cir. 1995).

4 Defendant responds the ALJ's analysis was appropriate in light
5 of medical records that medication successfully treated her
6 depression, her activities of daily living were inconsistent with
7 disability, and there was no evidence of recurring panic attacks,
8 just the fear of having another attack.

9 1. Opinion of Consulting Physician

10 The ALJ relied on the testimony of the consulting physician,
11 Dr. Gustavson. The ALJ noted in his opinion:

12 Based on his review of the claimant's record, Dr.
13 Gustavson, medical expert at hearing, also evaluated the
14 claimant's reported difficulties against the section
15 listings of 12.00 for mental health disorders, the
16 administratively recognized level impairments listed in
17 Appendix 1, Subpart P, Regulations No. 4. Specifically
18 listings 12.04 for affective disorder, 12.06 for anxiety-
related disorders, and 12.08 for personality disorders,
and he also opined that other than a moderate limitation
for interacting with the public, the claimant had no other
mental health functional limitations. And this was the
assessment findings of the state agency (DDS) medical
consultants.

19 (Tr. at 23, references to exhibits omitted.)

20 The opinion of a non-examining physician may be accepted as
21 substantial evidence if it is supported by other evidence in the
22 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
23 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
24 Cir. 1995). The opinion of a non-examining physician cannot by
25 itself constitute substantial evidence that justifies the rejection
26 of the opinion of either an examining physician or a treating
27 physician. *Lester*, at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502,
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1 506 n.4 (9th Cir. 1990). Cases have upheld rejection of an
2 examining or treating physician based in part on the testimony of a
3 non-examining medical advisor; but those opinions have also included
4 reasons to reject the opinions of examining and treating physicians
5 that were independent of the non-examining doctor's opinion.
6 *Lester*, at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55
7 (9th Cir. 1989) (reliance on laboratory test results, contrary
8 reports from examining physicians and testimony from claimant that
9 conflicted with treating physician's opinion); *Andrews*, 53 F.3d at
10 1043 (conflict with opinions of five non-examining mental health
11 professionals, testimony of claimant and medical reports); *Roberts*
12 *v. Shalala*, 66 F.3d 179 (9th Cir 1995) (rejection of examining
13 psychologist's functional assessment which conflicted with his own
14 written report and test results). Thus, case law requires not only
15 an opinion from the consulting physician, but also substantial
16 evidence (more than a mere scintilla, but less than a
17 preponderance), independent of that opinion which supports the
18 rejection of contrary conclusions by examining or treating
19 physicians. *Andrews*, 53 F.3d at 1039.

20 Here, Dr. Gustavson's testimony is internally inconsistent. He
21 testified Plaintiff suffered from panic disorder with agoraphobia,
22 dysthymia, and dependent personality, either features or disorder.
23 (Tr. at 348.) He further stated Plaintiff would have mild to
24 moderate limitations with respect to activities of daily living,
25 **moderate to marked** limitations with respect to social functioning,
26 moderate limitation in concentration, persistence and pace, and no
27 episodes of deterioration. (Tr. at 348-349.) On his written report
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1 (Psychiatric Review Technique, Ex. 12F), Dr. Gustavson noted mild to
2 moderate restriction of activities of daily living, **moderate to**
3 **marked** difficulties in social functioning, moderate difficulties in
4 maintaining concentration, persistence or pace, and no episodes of
5 deterioration. (Tr. at 305.) In the Mental Medical Source
6 Statement (Ex. 13F), Dr. Gustavson noted only a **moderate** limitation
7 in interacting with the general public. (Tr. at 312.) Thus, Dr.
8 Gustavson's opinions range from moderate to moderate-to-marked
9 difficulties in social functioning.

10 The ALJ also noted Dr. Gustavson's opinion was consistent with
11 other consulting physicians. However, consultant Dr. Gardner
12 observed on July 1, 2002, that Plaintiff would have moderate
13 limitations in her ability to complete a normal work day and week
14 without interruption, interact appropriately with the general
15 public, respond appropriately to changes in the work setting and
16 travel in unfamiliar places or use public transportation. (Tr. at
17 362.) Dr. Gardner did conclude, however, Plaintiff could understand
18 and remember instructions and procedures, persist at tasks with
19 occasional distraction, perform task-related social interaction,
20 adjust to change in the work environment, and handle routine
21 commutes. (Tr. at 265.) Thus, the ALJ's conclusion Dr. Gustavson's
22 opinion was supported by the opinions of other consulting physicians
23 is not entirely supported by the record.

24 2. Rejection of Examining and Treating Physicians' Opinions

25 Plaintiff also contends the ALJ failed to reject the opinions
26 of the examining and treating physicians with specific, legitimate
27 reasons. The ALJ commented with respect to the examinations by Drs.

1 Startzel and Rowe and Dr. O'Donnell's assessment in August 2000:

2 Psychological assessments in August 2000 [Dr. O'Donnell],
3 June 2001 [MSW counselor] and October 2002 [that of Dr.
4 Startzel] indicated that the claimant suffered from
5 depression and/or panic disorder, and had "marked"
6 impairments severity limitations. However, each of these
7 assessments also indicated that this was only expected to
8 last 6 months. And treatment records for July 2000, June
9 2001 and September 2002 reported that her medication had
10 been helping her significantly and that she had denied any
11 significant symptomatology. In fact, treatment records as
12 early as 1997-1998 indicated that her depression was under
13 control with medication.

14 A consultative psychological assessment evaluation in
15 March 2002 [that of Dr. Rowe] indicated that the
16 claimant's panic disorder was based on her persistent
17 concern over having additional panic attacks which
18 prevents her from leaving her home or engaging in unique
19 behaviors. However, it appeared that she had not had such
20 an attack since the year before, and she reported
21 attending to all her own activities of daily living
22 including taking care of her daughter and doing the
23 shopping.

24 . . .

25 The undersigned also notes that despite indications of
26 anxiety and panic attacks, the claimant has had no
27 difficulty seeking medical care, which requires
28 interacting with others and going to a public facility,
and that such anxiety complaints have not prevented her
from horseback riding with some regularity.

19 (Tr. at 22-23, references to exhibits omitted.) The question is
20 whether these findings are specific and legitimate and supported by
21 the record.

22 The medical record of the treating providers prior to the date
23 of onset (June 1, 2000) discloses Plaintiff had her first
24 psychological assessment for panic attack treatment in October 1993
25 when she reported to Dr. O'Donnell that she suffered from panic
26 attacks and depression not fully controlled on Prozac. (Tr. at
27 153.) The attacks continued into 1994 (Tr. at 153) when Paxil was

1 prescribed. The Paxil resulted in some improvement in March 1994
2 (Tr. at 156). Plaintiff was reported to be the caretaker of five
3 children in 1994 and had been doing so for several years. (Tr. at
4 161.) Depression and anxiety increased again in February 1995 and
5 Paxil was restarted. (Tr. at 166.) Some improvement was reported
6 in February 1996 (Tr. at 170) and in April 1997, Plaintiff requested
7 a method for discontinuing the Paxil. (Tr. at 177.) Plaintiff at
8 that time was using fertility drugs in an attempt to become
9 pregnant. (Tr. at 180.) Paxil was restarted in August 1997. (Tr.
10 at 182.) Improvement was observed in June 1998 and in February
11 1999. (Tr. at 188, 195.) However, there was an exacerbation of
12 symptoms in September 1999 following a marital dissolution and Paxil
13 dosage was increased. (Tr. at 201.) In November 1999, she reported
14 a lessening of the effects of depression and panic attacks, but the
15 symptoms increased in January 2000. (Tr. at 204, 206.) In August
16 2000, Dr. O'Donnell noted several marked and moderate limitations
17 due to severe panic disorder, depressed mood and paranoid behavior.
18 (Tr. at 225-227.)

19 Following the alleged date of onset (June 1, 2000), Plaintiff
20 reported a sleep disorder and Trazadone was prescribed. (Tr. at
21 209.) A follow-up in June 2001 disclosed good control with 40 mg
22 Paxil. (Tr. at 211.) On July 13, 2001, Plaintiff's GAF was
23 assessed at 75, indicative of only transient and slight limitations.
24 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV),
25 at 32 (1995). (Tr. at 134.) Plaintiff attended only two counseling
26 sessions and counseling was discontinued on October 26, 2001. (Tr.
27 at 141.)

1 On March 12, 2002, Plaintiff was evaluated by Dr. Rowe at the
2 request of the Social Security Administration. He noted Plaintiff
3 spent her time reading, watching television, drawing, doing
4 embroidery, and shopping weekly with her daughter or landlord. (Tr.
5 at 230.) She was neat and tidy, with average speech, tone, and fair
6 concentration. She had good eye contact, but appeared slightly
7 anxious. Dr. Rowe diagnosed dysthymia, panic disorder with
8 agoraphobia, and rule-out math learning disability.¹ He assessed her
9 current and past year global assessment of functioning (GAF) at 45,
10 indicative of serious limitations. DIAGNOSTIC AND STATISTICAL MANUAL OF
11 MENTAL DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995). (Tr. at 231-
12 232.) Dr. Gustavson rejected this GAF as not supported by the
13 mental examination findings, and in light of the findings and other
14 medical evidence, his conclusion is supported by the record. (Tr.
15 at 360.)

16 Psychologist Jeffrey Startzel, Psy.D., on staff at Chelan-
17 Douglas Behavioral Health, examined Plaintiff in October 2002 and
18 concluded she had several marked and severe limitations. (Tr. at
19 288-290.) He noted severe depressed mood, expression of anxiety or
20 fear, social withdrawal and global illness. Plaintiff had a marked
21 limitation in her ability to understand complex directions and

22 ¹Plaintiff also contends the ALJ failed to develop the medical
23 record with respect to the rule-out diagnosis of learning disorder
24 by Dr. Rowe. To the extent additional evidence is necessary to
25 resolve any ambiguity as to the severity of a learning disorder, the
26 ALJ has a duty to develop the record. 20 C.F.R. §§ 404.1519a(b)(1),
27 (4), 416.919a(b)(1), (4).
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1 severe limitation in ability to relate appropriately to co-workers,
2 interact appropriately in public contacts, and respond appropriately
3 to pressures of the work setting. Dr. Startzel observed rigid
4 posture, slow motor behavior, blunted affect, cooperative attitude,
5 and appropriate eye contact and pressured speech with stammer. (Tr.
6 at 292.) Dr. Startzel diagnosed major depressive disorder recurrent
7 without psychotic features and panic disorder with agoraphobia.
8 (Tr. at 289.) Dr. Gustavson rejected Dr. Startzel's conclusions
9 because they were based on a brief contact and self-report. (Tr. at
10 361.) However, evidence from a therapist at Chelan-Douglas
11 Behavioral Health, dated August 22, 2003, some five days before the
12 ALJ's opinion was issued, indicated Plaintiff was disabled due to
13 agoraphobia. (Tr. at 343.) This evidence was not addressed by the
14 ALJ.

15 CREDIBILITY

16 Plaintiff contends the ALJ did not properly reject her
17 testimony with clear and convincing reasons and failed to address at
18 all the statement of her witness. Defendant asserts the ALJ
19 properly rejected her assertions of disability because the medical
20 record supports a finding medication had improved Plaintiff's
21 depression and that she had not suffered a panic attack for one
22 year. As further noted by the ALJ, Plaintiff had no difficulty
23 seeking medical care (an indication of her ability to interact with
24 the public), was independent for activities of daily living, and had
25 ridden horseback on two occasions. Defendant concedes the ALJ did
26 not address the daughter's statement, but argue any error was
27 harmless in light of the conflict between that testimony and the
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1 medical record.

2 The ALJ must engage in a two-step analysis in deciding whether
3 to admit a claimant's subjective symptom testimony. *Smolen v.*
4 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
5 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the
6 claimant must produce objective medical evidence of underlying
7 "impairment," and must show that the impairment, or a combination of
8 impairments, "could reasonably be expected to produce pain or other
9 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there
10 is no evidence of malingering, then the ALJ, under the second step,
11 may reject the claimant's testimony about severity of symptoms with
12 "specific findings stating clear and convincing reasons for doing
13 so." *Id.* at 1284. The ALJ may consider the following factors when
14 weighing the claimant's credibility: "[claimant's] reputation for
15 truthfulness, inconsistencies either in [claimant's] testimony or
16 between [his/her] testimony and [his/her] conduct, [claimant's]
17 daily activities, [his/her] work record, and testimony from
18 physicians and third parties concerning the nature, severity, and
19 effect of the symptoms of which [claimant] complains." *Light v.*
20 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's
21 credibility finding is supported by substantial evidence in the
22 record, the court may not engage in second-guessing. See *Morgan v.*
23 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
24 a reason given by the ALJ is not supported by the evidence, the
25 ALJ's decision may be supported under a harmless error standard.
26 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the
27 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,
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1 734 F.2d 1378, 1380 (9th Cir. 1984) (same). Here, there is no
2 evidence of malingering; thus, any rejection of Plaintiff's
3 testimony must be supported by clear and convincing evidence.

4 A review of the ALJ's opinion does not disclose a separate
5 analysis of the credibility of Plaintiff's testimony. The ALJ does
6 mention the scope of Plaintiff's daily activities and medical
7 records, which support his conclusion that medication successfully
8 controlled her mental impairments. However, the manner in which she
9 conducted daily activities (shopping at night accompanied by
10 landlord or daughter, horseback riding on only two occasions as an
11 attempt at therapy but which ended up in treatment for injury (Tr.
12 at 375, 269, 276), and attending medical appointments) was not
13 inconsistent with activities which could be performed by someone
14 disabled by depression and/or panic disorder. Additionally, there
15 is no evidence Plaintiff provided care for her daughter who is an
16 adult; there is evidence, however, Plaintiff provided child care for
17 her grandchildren for six to eight hours a day (Tr. at 369-370),
18 activity which would not support a finding of disability. Finally,
19 there is no evidence Plaintiff's condition did not meet the
20 durational requirement of one year as medical records demonstrate
21 treatment for depression and panic attacks from 1993 through 2004.

22 Additionally, there is no mention of the credibility assigned
23 to the statement provided by Plaintiff's daughter. (Tr. at 105.)
24 "[L]ay witness testimony as to a claimant's symptoms or how an
25 impairment affects ability to work is competent evidence and
26 therefore *cannot* be disregarded without a statement reasons that are
27 germane to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467

(9th Cir. 1996), citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993) (other citations omitted).

REMAND

Case law requires an immediate award of benefits when "(1) the ALJ has failed to provide legally sufficient reasons for rejecting [a medical opinion], (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir.), *cert. denied*, 531 U.S. 1038 (2000), citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The court has some flexibility in determining whether to remand for an immediate award of benefits or for additional administrative proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003). Here, there are outstanding issues that must be resolved before a determination of disability can be made: namely, the correct weight to be given the opinions of the medical experts, including the 2003 opinion of the therapist as to disability and any supporting mental health treatment records, whether there is a severe learning disorder that would affect Plaintiff's residual functional capacity and a re-assessment of Plaintiff's credibility. After findings are made regarding this evidence, a revised residual capacity assessment should be made. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is **GRANTED**; the matter is **REMANDED** for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

4. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. The file shall be **CLOSED** and judgment entered for Plaintiff.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE